Filed 8/25/04 Christiansen v. Fire Ins. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAUL M. CHRISTIANSEN, Plaintiff and Appellant, v. FIRE INSURANCE EXCHANGE et al., Defendants and Respondents.	B169521 (Los Angeles County Super. Ct. No. SC071476)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lorna Parnell, Judge. Affirmed.

John K. Saur for Plaintiff and Appellant.

Gordon & Rees, Peter Schwartz and Christopher R. Wagner for Defendants and Respondents.

The trial court granted summary judgment for defendant insurers, and plaintiff Paul Christiansen appeals. Fire Insurance Company provided the primary policy, and

Truck Insurance Company provided the umbrella policy.[1] Plaintiff conceded at trial that the only issue was whether Truck owed a duty to defend and breached that duty; he agreed that neither insurer owed a duty to indemnify and that Fire, the primary insurer, had no duty to defend.

The question is whether a previous release between these parties bars plaintiff's current lawsuit against Truck and/or whether Truck's umbrella policy covers plaintiff's request to defend a malicious prosecution brought against him. After a series of lawsuits beginning with a 1993 homeowner's assessment and an eventual $25,000 settlement and release between appellant and his insurers, plaintiff sought a defense from a malicious prosecution action brought against him by the Brewer & Brewer law firm after plaintiff unsuccessfully sued the firm for abuse of process. Plaintiff contends that his earlier settlement with his insurers did not include a release of any future requests for benefits arising out of or "resulting" from the claims that were previously settled; that potential for coverage exists under *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295-300; and summary judgment was therefore erroneously granted. We conclude, as did the trial court, that the release bars the current lawsuit, and we shall therefore affirm the summary judgment.

PROCEDURAL HISTORY

The underlying litigation

After several storms damaged the Foothills Townhome complex in Orange County, plaintiff's homeowner's association made a special assessment of $1300 per member. Plaintiff paid the assessment under protest and then sued for a refund. Plaintiff prevailed in small claims court and in a trial de novo in superior court, and the Association refunded the $1300.

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[1] We refer to defendants and respondents as "Fire," "Truck," and collectively as "insurers."

When the Association made a second $1300 assessment to plaintiff in 1995, plaintiff again sued in small claims court and won. The Association, represented by the law firm Brewer & Brewer, sued in municipal court to enforce the second $1300 assessment against plaintiff and others. The Association prevailed in its motion for summary judgment after transfer of the declaratory relief action in the superior court, which added $13,395 in attorney fees to the judgment.[2] The Court of Appeal affirmed the judgment (*Foothills Townhomes Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 691 abrogated in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92, fn. 7.) The California Supreme Court denied review, and the United States Supreme Court denied certiorari.

The trial court amended the judgment and assessed $13,395 for attorney fees plus additional interest. Plaintiff eventually paid the judgment, including attorney fees, a total of $15,377.35, but refused to pay collection-related fees incurred by the Association. The trial court denied the Association's motion to amend the judgment to add the $4000 in collection-related attorney fees; the Court of Appeal reversed and held plaintiff was responsible for those fees and attorney fees and costs on appeal as well. (*Foothills Townhomes Association v. P.M.C. Trust Estate* (Feb. 16, 1999, G023286 [nonpub. opn]; *Foothills Townhomes Association v. Christiansen* (October 3, 2001, G024447 [nonpub. opn].)

Based on Brewer & Brewer's representation of the Association, plaintiff sued that law firm, several of its attorneys, VSC Attorney Services and its process server for inter alia abuse of process and fraud, claiming he had not been properly served and an

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[2] The Brewer & Brewer law firm then sought to collect the judgment and served a notice of judgment debtor examination on plaintiff, who claimed he had never been personally served. However, after a warrant was issued, but held, plaintiff appeared at the second scheduled judgment debtor examination and paid the outstanding judgment. He then sued the law firm and attorney service for abuse of process, eventually leading to the law firm's malicious prosecution action against him and his claim of insurance coverage for that malicious prosecution lawsuit, the gravamen of the complaint against plaintiff's insurers in the case at bench.

allegedly false proof of service had been submitted.[3] Brewer & Brewer and its attorneys alleged they demanded plaintiff dismiss the abuse of process action or it would file a motion for summary judgment and would bring a malicious prosecution action against him. Plaintiff did not dismiss the action, so the Brewer plaintiffs, the firms and several of its attorneys, successfully filed a motion for summary judgment in the abuse of process lawsuit and filed a complaint for malicious prosecution against plaintiff and his attorney. That action was tried in December 2000. The Brewer plaintiffs were awarded $28,160; the Court of Appeal affirmed the judgment[4] and the California Supreme Court denied review.

Plaintiff's tenders to his insurers

Plaintiff tendered the initial Association action to Fire and Truck in April 1997, and Fire agreed to defend in that action. Thereafter, plaintiff submitted other insurance claims, a 1998 burglary loss, September 1998 claim for damage to his townhome allegedly arising from a plumbing leak, a new $581 homeowner assessment in 1998, and an action in which he sued political opponents in 2000. (See *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, disapproved in *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67, fn, 5.) Representing himself, plaintiff then sued the insurers for breach of contract and bad faith regarding the outstanding insurance claims. The parties settled for $25,000, and plaintiff executed a release of claims that is at issue in the case at bench.

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[3] Plaintiff also made a criminal complaint against Brewer & Brewer, but the Orange County District Attorney's office refused to prosecute.

[4] The Court of Appeal in *Brewer v. Christiansen* (September 30, 2002, G028840 [nonpub.]) stated it read all of the trial testimony in the case and concluded that "all reasonable lawyers would agree the merit value of the action . . . filed on Christiansen's behalf was zero, based on the facts at hand when the suit was filed."

The release

The six-page document entitled Settlement Agreement and Release states that "Certain disputes have arisen and exist, including PMC's [plaintiff Paul M. Christiansen's] rights under several insurance policies (including, but not limited to [the subject Fire Townhouse/Condo Owners Package Policy, Truck's personal Umbrella Policy as well as the Association's policy, issued by Truck] for the following five claims."

The release then listed five different claims: l) the $581 assessment, paid by Fire in 1999; 2) 1998 and 1999 claims for benefits resulting from a broken pipe in the wall of plaintiff's townhouse; 3) a 1998 claim from a burglary in the townhouse; 4) the 1995 assessment and disputes at issue in the case at bench;[5] 5) a claim for benefit, including attorney fees and costs relating to the *Paul v. Hanyecz* lawsuit. The document then relates that as a "result of Fire's and Truck's adjustment and handling of PMC's claims" PMC filed a lawsuit in Orange County for breach of contract against Fire and Truck in May 1999 and that PMC, Fire, and Truck determine that "it was in their respective best interests to attempt to resolve those disputes. In connection thereof, on August 19, 1999, PMC dismissed without prejudice" the May 1999 "Action" and "[s]ince then, the Parties . . . have determined that it is in their respective best interests to resolve their disputes."

The parties then set forth the terms of their agreement, which included the payment of $25,000 to plaintiff, all parties bearing their own attorney fees and costs incurred "as a result of the Action and each waives any right to recover such sums from

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[5] Claim #4 is described as follows: "On or about February 13, 1995, PMC was assessed approximately $1,300.00 by the H.O.A. PMC submitted a claim for benefits. It was assigned claim number X7-046297. PMC's legal disputes with the H.O.A. over this assessment resulted in lawsuits and monetary awards, including awards of attorneys' fees and costs. Fire and/or Truck have been paying part of PMC's attorneys' fees and costs to defend PMC in these lawsuits. PMC's legal disputes with the H.O.A. are still pending."

the other." Moreover, plaintiff agreed to execute a request for dismissal with prejudice of the Action against Fire and Truck and cooperate in the preparation and filing of any additional documents necessary to dismiss the Action with prejudice.

Paragraph 3 of the Terms of Agreement, entitled "general release" states that plaintiff agreed to release "fully and forever" Fire and Truck "on behalf of his beneficiaries, partners, agents dependent, trusts, employees, attorneys, heirs, executors, administrators, predecessors, successors, and assigns . . . **FROM ANY AND ALL CLAIMS**, demands, defenses, liens, agreements, contracts, covenants actions, suits, causes of action, including, but not limited to, claims for breach of duty of fair dealing and good faith, breach of contract, right to payment/reimbursement of any judgment, assessment, attorneys' fees, or costs, whether past, current or future for any of Claims 1-5, H.O.A. assessments *(involving Claims 1 and 4) made prior to the date this Agreement is executed*, common law fraud, loss of personal property, the Action, Business & Professions Code § 17200 et seq., Insurance Code § 790.03 and *any regulations promulgated thereunder, obligations, controversies, attorneys' fees, costs, expenses, damages, judgments, orders, or liabilities of whatever kind and nature in law, equity, or otherwise under all insurance policies issued by Fire and Truck to PMC or the H.O.A. for PMC's Claims 1-5 identified on pages 1-2 above, whether known or unknown, that PMC may now have, own or hold, or at any time ever had, owned, or held, or could, shall, or may have, own, or hold against Fire and Truck*." (Italics added.)

Furthermore, plaintiff represented he was fully aware of California Civil Code Section 1542 [then quoted][6] and knowingly and voluntarily waived the provision, acknowledging such waiver "is an essential and material term of this Agreement and

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[6] Civil Code section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

without such waiver, the Agreement would not have been entered into by Fire and Truck."

Paragraph 5.8 states: "Each party declares that the terms of this Agreement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise, adjustment in settlement of any and all claims, disputed or otherwise, on account of the events, damages, and injuries above mentioned, and for the express purpose of precluding forever any further or additional claims which form the basis for the Action under the Policy that was issued by Fire and Truck to PMC."

Paragraph 5.9 adds: "It is understood and agreed that this Agreement is intended to avoid the expenses of further and future litigation. It is a compromise of disputed claims and is not to be construed as an admission of liability on the part of any of the Parties hereto. Such liability is expressly denied." The Agreement was to be "confidential" and if a proceeding was brought to enforce any of its terms and provisions, the prevailing party would be entitled to reasonable attorney fees, costs and expenses. The Los Angeles Superior Court was to have exclusive jurisdiction over any action between the parties arising out of the agreement.

The current litigation

Less than two months after executing the release, plaintiff tendered the Brewer & Brewer malicious prosecution action to Fire and Truck. On July 29, 2000, less than 60 days later, the insurers informed plaintiff that under the terms of the settlement agreement Fire "did not owe coverage." The claims representative added: "However, we will investigate this matter further and advise you of our decision." Fire agreed to investigate further and advise Mr. Christiansen of its decision. Relying on the release agreement, Fire and Truck declined plaintiff's request for defense and indemnity on December 11, 2000.[7] Judgment was entered against Christiansen.

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[7] The letter declining coverage added that "the claims asserted against you in the malicious prosecution lawsuit may not be covered for a variety of reasons. However,

On July 5, 2002, almost two years after the claims representative's assertion that Fire "did not owe coverage" but would investigate and a year and a half after Fire and Truck confirmed they would not cover the claim because of the release plaintiff had signed, plaintiff filed the complaint at issue in the case at bench. The operative complaint for damages named Fire and Truck as defendants; set forth some of the underlying litigation; and claimed that notwithstanding the subject release, the policies issued to plaintiff by Fire and Truck provided defense and indemnity for inter alia malicious prosecution. Plaintiff sued for breach of written contract and for breach of the implied covenant of good faith and fair dealing.

Motion for summary judgment

Insurers' motion for summary judgment (MSJ) and for summary adjudication was based on several grounds, including the previous release, lack of coverage for malicious prosecution claims,[8] the intentional acts exclusion of the umbrella policy, Insurance Code section 533, and the "genuine dispute doctrine." Moreover, insurers argue that where there is no coverage, there can be no breach of contract or breach of the implied covenant of good faith and fair dealing. Insurers' separate statement of undisputed facts set forth various provisions of the policies and the release.

Plaintiff's opposition agreed "entirely *that neither defense nor indemnity is available under the primary policy and concurs that indemnity coverage under the umbrella policy is precluded by California Insurance Code* [*section*] *533*." (Italics

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since you have entered into a general release, we will not discuss the detailed terms of the policies in this particular correspondence." The letter of December 11 was "sent six days after trial was begun."

[8] Insurers contended that appellant was not covered for the malicious prosecution action under the subject policies in that the malicious prosecution action did not allege an "occurrence," defined as an "accident" under the primary policy and did not allege "bodily injury" or property damage" required for coverage required by the policy. In addition, insurers argued that coverage was excluded based upon the "intentional acts exclusion" of the policy.

added.) Nevertheless, plaintiff contended that defendants' argument "as to . . . the effect of the release and . . . its obligation to defend under the umbrella policy against the malicious prosecution action, are built on smoke, mirrors, and a linguistic shell game."

Plaintiff's argument was that the umbrella policy provides a duty to defend malicious prosecution lawsuits and the release does not apply to the malicious prosecution lawsuit brought by Brewer & Brewer because it was not one of the five claims specifically settled in the release. The relevant statement of undisputed fact submitted by plaintiff provided: "The release was understood by plaintiff to be consistent with its own plain language, i.e., confined only to those specific discrete five claims in the release, plus home owners assessments involved in claims 1-4; it has no application to claims arising from defense of future suits."

Plaintiff's declaration in opposition to the MSJ stated that the malicious prosecution claim was separate from claims 1-5; he was releasing claims only as specified in the agreement; the release is strictly limited to those claims; and he had no knowledge of the malicious prosecution claim until June 2000, after signing the release. The attorney involved in the underlying litigation also attested that "the terms of the settlement are quite clear and it was clearly understood by all the parties that only claims made by Paul Christiansen against Farmers 'prior to the date of that agreement is executed' were the claims covered in the settlement. There was never any agreement to release Farmers from anything other than claims 1-5 and homeowners assessments involving claims 1 and 4, which claims had been made prior to the date of the agreement." Moreover, the attorney declared that Farmers did not respond to his tender for six months, and that delay "ended six days after the trial in the malicious prosecution action had begun."[9]

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[9] Fire and Truck objected to portions of the declarations submitted by plaintiff and his attorney. The trial court sustained the objections.

The trial court's decision

The trial court issued a six-page minute order granting the MSJ. After setting forth the procedural history of the underlying litigation and the section 1542 waiver,[10] the court explained its reasoning in granting summary judgment: "Plaintiff argues that the release is limited to disputes that he was aware of at the time he entered into the release. This is obviously not so because of the waiver of the provisions of Civil Code Section 1542. He also argues that the release is limited to claims made prior to the date of the release. This is likewise not so. Finally, plaintiff argues that if the release were construed in the manner in which defendants suggest, plaintiff would have released Fire and Truck from any claim under the policy in the future regardless of what the claim was related to. That is not the position taken by defendants. Rather, defendants argue that the release includes the plaintiff's present claim against Truck for failure to defend plaintiff in the underlying malicious prosecution lawsuit brought by the attorneys for the homeowner's association to collect the judgment against plaintiff (which the homeowner's association obtained in the assessment litigation with plaintiff) because that lawsuit unquestionably was one which resulted from the ongoing assessment dispute with the homeowner's association."

Judgment was entered, and this appeal follows. Notwithstanding plaintiff's concession that Fire is not liable, the appeal is from the judgment entered "in favor of the defendants, FIRE INSURANCE EXCHANGE and TRUCK INSURANCE EXCHANGE, and against plaintiff . . . ."

CONTENTIONS ON APPEAL

Appellant contends: 1. The release, characterized as "pellucidly clear," does not cover the malicious prosecution action. 2. There is a duty to defend where there is a

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[10] The court also noted plaintiff's concession "that Fire did not owe him any duty to defend or indemnify with respect to the underlying malicious prosecution action" and "that Truck did not owe him any obligation to indemnify with respect to the underlying malicious prosecution action."

potential for coverage. 3. There is a duty to defend claims of malicious prosecution (*Downey Venture v. LMI Ins.* (1998) 66 Cal.App.4th 478, 508-509) even where there is no duty to indemnity coverage. 4. The trial court ignored the possibility of vicarious liabilty for indemnity and defense benefits. 5. The "genuine issue" argument, not reached by the trial court, does not apply in the case at bench.

DISCUSSION

1. Standard of review.

"Because plaintiff appeals from an order granting defendants summary judgment, we must independently examine the record to determine whether triable issues of material fact exist. (Code Civ. Proc., § 437c, subd. (c); [citations]." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) Moreover, "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [plaintiff, the losing party's] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. [Citations.])" (*Id*. at pp. 768-769.)

2. The settlement and release bar this lawsuit.

The trial court concluded that the settlement and release barred a defense to the malicious prosecution action brought by the Brewer & Brewer law firm. Therefore, it was unnecessary for the trial court to reach the other grounds raised in support of the MSJ by Fire and Truck. Appellant contends that the release does not encompass the current dispute.

The court in *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1162, concluded "it is possible for a general release to effectively accomplish its primary purpose: to enable parties to end their relationship and permanently terminate their mutual obligations" and that the release before the court accomplished that purpose. The subject release included all claims, known and unknown, and specifically waived the protection of Civil Code

section 1542.[11] The release in *Winet* was executed as part of a settlement regarding attorney fees allegedly owed by Winet to a law firm. When Winet was sued nearly 15

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[11] Explaining the contested release, the court in *Winet v. Price*, *supra*, stated: "The general release, which named (among others) Price and Winet as releasing parties, provided for a release of 'any and all . . . claims, . . . damages and causes of action whatsoever, of whatever kind or nature, *whether known or unknown, or suspected or unsuspected* . . . against any other Party . . . .' (Italics added.) The release of all 'known or unknown, or suspected or unsuspected' claims also specifically included all claims arising:

'(a) By reason of any matter or thing alleged or referred to, or directly or indirectly or in any way connected with or arising out of or which may hereafter be claimed to arise out of all or any of the matters, facts events or occurrences alleged or referred to in any of the pleadings on file in [the Price v. Winet collection action].

'(b) Arising out of or in any manner connected with the performance of legal services by [Price or his law firms] for [Winet or his entities], or any act or omission by any Party in connection with said legal services or any request for the performance of legal services.

'(c) Arising out of or in any way connected with any loss, damage, or injury whatsoever, known or unknown, suspected or unsuspected, resulting from any act or omission, by or on the part of any Party, committed or omitted prior to the date hereof.'

The parties did specifically except from their agreement any claims connected with 'any act or omission committed or omitted relating to Canoga Storage Partners, Ltd. . . . ' (Release, ¶ (d)), but made no similar exception for the Newark partnership. The parties then reaffirmed that their agreement included unknown or unsuspected claims, declaring:

'All Parties to this Mutual General Release do hereby further agree as follows:

'(1) There is a risk that subsequent to the execution of this Mutual General Release, one or more Parties will incur or suffer loss, damages or injuries which are in some way caused by the transactions referred to above, but which are unknown and unanticipated at the time this Mutual General Release is signed.

'(2) All Parties do hereby assume the above-mentioned risks and understand that this Mutual General Release SHALL APPLY TO ALL UNKNOWN OR UNANTICIPATED RESULTS OF THE TRANSACTIONS AND OCCURRENCES DESCRIBED ABOVE, AS WELL AS THOSE KNOWN AND ANTICIPATED, and upon advice of legal counsel, all Parties do hereby waive any and all rights under California Civil Code § 1542, which section has been duly explained and reads as follows: [¶] "A general

years later by some of the limited partners in the Newark partnership seeking damages for Winet's allegedly breaching his duties as general partner, Winet cross-complained against Price for legal malpractice in drafting the partnership documents. (*Id.* at p. 1164.)

Price brought a motion for summary judgment. Winet opposed with a declaration stating in part that "when he signed the release he did not intend to waive all possible disputes with Price over Price's legal services, and that he was unaware at the time he signed the release of the possibility of the present action." (*Winet v. Price*, *supra*, 4 Cal.App.4th 1159, 1164.) The *Winet* court, *id*. at pages 1166-1167, relied on the rules governing admission of parol evidence, excluded the declaration as irrelevant evidence of undisclosed subjective intent (*id*. at p. 1166, fn. 3), and concluded the outward expression of the agreement unambiguously declared the parties' intention to release each other from "all claims, known or unknown, suspected or unsuspected, arising from either the facts described in the collection lawsuit . . . or any act or omission in connection with the legal services Price rendered to Winet." Moreover, the parties, represented by counsel, specifically waived the protection of section 1542 and, in capital letters, stated the release would apply to unknown and unanticipated results as well as transactions known and anticipated. (*Id*. at p. 1166-67.)

We similarly construe the release in the case at bench.[12] Christiansen is obviously a sophisticated litigant. He chose to release his insurers from certain claims. The

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release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release . . . ."'

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'(4) The advice of legal counsel has been obtained by all Parties prior to signing this Mutual General Release. All Parties execute this Mutual General Release voluntarily, with full knowledge of its significance, and with the express intention of effecting the legal consequences provided by [Civ.Code, § 1541], i.e., the extinguishment of all obligations.'" (*Winet v. Price*, *supra*, 4 Cal.App.4th 1159, 1162-1164)

[12] Plaintiff represented he was fully aware of California Civil Code Section 1542, which was quoted, and knowingly and voluntarily waived the provision, acknowledging

settlement agreement states that "*Certain disputes have arisen and exist*, including [plaintiff Paul Mr. Christiansen's] rights under several insurance policies . . . for the following five claims." (Italics added.) The description of Claim #4 in the release is as follows: "On or about February 13, 1995, PMC [plaintiff Paul M. Christiansen] was assessed approximately $1,300.00 by the H.O.A. PMC submitted a claim for benefits. It was assigned claim number X7-046297. *PMC's legal disputes with the H.O.A. over this assessment resulted in lawsuits and monetary awards*, including awards of attorneys' fees and costs. Fire and/or Truck have been paying part of PMC's attorneys' fees and costs to defend PMC in these lawsuits. PMC's legal disputes with the H.O.A. are still pending." (Italics added.)

The document then relates that as a "result of Fire's and Truck's adjustment and handling of PMC's claims" PMC filed a lawsuit in Orange County for breach of contract against Fire and Truck in May 1999 and that PMC, Fire, and Truck determine that "it was in their respective best interests to attempt *to resolve those disputes*. (Italics added.) In connection thereof, on August 19, 1999, PMC dismissed without prejudice" the May 1999 "Action" and "[s]ince then, the Parties . . . have determined that *it is in their respective best interests to resolve their disputes*." (Italics added.)

The parties then set forth the terms of their agreement, which included the payment of $25,000 to plaintiff; all parties were to bear their own attorney fees and costs incurred "as a result of the Action and each waives any right to recover such sums from the other." Moreover, plaintiff agreed to execute a request for dismissal with prejudice of the Action against Fire and Truck and cooperate in the preparation and filing of any additional documents necessary to dismiss the Action with prejudice.

Paragraph 3 of the Terms of Agreement, entitled "general release" states that plaintiff agreed to release "fully and forever" Fire and Truck "on behalf of his

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such waiver "is an essential and material term of this Agreement and without such waiver, the Agreement would not have been entered into by Fire and Truck."

beneficiaries, partners, agents dependent, trusts, employees, attorneys, heirs, executors, administrators, predecessors, successors, and assigns . . . **FROM ANY AND ALL CLAIMS**, demands, defenses, liens, agreements, contracts, covenants actions, suits, causes of action, including, but not limited to, claims for breach of duty of fair dealing and good faith, breach of contract, right to payment/reimbursement of any judgment, assessment, attorneys' fees, or costs, *whether past, current or future for any of Claims 1-5*, H.O.A. assessments (involving Claims 1 and 4) made prior to the date this Agreement is executed, common law fraud, loss of personal property, the Action, Business & Professions Code § 17200 et seq., Insurance Code § 790.03 and any regulations promulgated thereunder, obligations, controversies, attorneys' fees, costs, expenses, damages, judgments, orders, or liabilities of whatever kind and nature in law, equity, or otherwise under all insurance policies issued by Fire and Truck to PMC or the H.O.A. *for PMC's Claims 1-5* identified on pages 1-2 above*, whether known or unknown, that PMC may now have, own or hold, or at any time ever had, owned, or held, or could, shall, or may have, own, or hold against Fire and Truck*." (Italics added.)

Paragraph 5.8 states: "Each party declares that the terms of this Agreement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise, adjustment *in settlement of any and all claims, disputed or otherwise, on account of the events, damages, and injuries above mentioned, and for the express purpose of precluding forever any further or additional claims which form the basis for the Action under the Policy that was issued by Fire and Truck to PMC*." (Italics added.)

The parties agree that the usual rules for contract interpretation apply to a settlement agreement. (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558-559.) "'Under standard rules of contract interpretation, the mutual intent of the parties at the time the contract was formed governs its construction. (Civ. Code, § 1636.) So far as possible, we must infer that intent solely from the written provisions of the contract. (*Id*., § 1639.)' (*Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 456

[54 Cal.Rptr.2d 811].) Ambiguous language in an insurance policy is construed against the insurer and in favor of coverage, if the ambiguity cannot be resolved under more general rules governing the interpretation of contracts. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [10 Cal.Rptr.2d 538, 833 P.2d 545.]) 'On the other hand, where the express provisions of an insurance contract are unambiguous, the "clear and explicit" meaning of those provisions, interpreted in their "ordinary and popular sense," controls judicial interpretation, unless "used by the parties in a technical sense, or unless a special meaning is given to them by usage . . . ."' (*Borg v. Transamerica Ins. Co.*, *supra*, at p. 456, citations omitted.) We are not bound by the trial court's interpretation of the policy language, but must make our own independent interpretation. (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1118 [44 Cal.Rptr.2d 272].)" (*Whiteside v. Tenet Healthcare Corp*. (2002) 101 Cal.App.4th 693, 702-703.)

The parties differ on the application of the law to the language of the settlement agreement in the case at bench. Appellant contends that the release does not encompass defense of the malicious prosecution action but applies only to the specific litigation involving the homeowners' assessment, disputes between Farmers and appellant, and not to unmentioned potential lawsuits brought by unnamed third parties against appellant. Appellant characterizes the malicious prosecution action by Brewer & Brewer as "a claim which is neither envisioned nor encompassed by any of the language of the release." Moreover, if the language is ambiguous, appellant contends that any ambiguity should be construed against Farmers, the drafter.[13]

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[13] "The determination of whether a release contains ambiguities is a matter of contractual construction. [Citation.] 'An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.] An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence.' [Citation.] The circumstances under which a release is executed can give rise to an ambiguity that is not apparent on the face of the release. [Citation.] If an ambiguity as to the scope of the release exists, it should normally be construed against the drafter. [Citations.]" (*Benedek v. PLC Santa Monica* (2002)104 Cal.App.4th 1351, 1357.)

Claim #4 and the language of the settlement agreement are broader than appellant's interpretation. Claim #4 describes the "lawsuits and monetary awards, including awards of attorneys fees and costs" that "resulted" from the homeowner's assessment. The settlement agreement includes "*PMC's Claims 1-5* identified on pages 1-2 above*, whether known or unknown, that PMC may now have, own or hold, or at any time ever had, owned, or held, or could, shall, or may have, own, or hold against Fire and Truck*." (Italics added.) Appellant signed the settlement agreement April 18, 2000. At that point, appellant's own abuse of process lawsuit against Brewer & Brewer had ended in summary judgment for the law firm a year before, in April 1999. The law firm had filed its verified complaint for malicious prosecution against appellant in January 2000; it contained an allegation, undisputed by appellant, that the law firm warned appellant they would file a malicious prosecution action if he did not dismiss the abuse of process action.[14] Appellant claims he did not know of the malicious prosecution lawsuit when he signed the settlement agreement. Nonetheless, the plethora of litigation surrounding his $1300 homeowner's assessment was known to him. The release applied to the disputes known and unknown; the malicious prosecution action was part and parcel of that litigation. The release and settlement agreement executed by appellant bars the instant lawsuit brought by appellant against his insurer.

Even if the release did not encompass the instant dispute, respondent contends that summary judgment was properly granted in that there is no coverage for the underlying malicious prosecution action under the Truck umbrella policy because a) the "drop down" requirements are not satisfied by the underlying malicious prosecution action; b) coverage is excluded by the "intentional acts exclusion" and c) plaintiff's duty to defend arguments have no merit in that a duty to defend did not arise during the time period Truck investigated the claim and the underlying malicious prosecution action does

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[14] Appellant's response was that that "fact" was "[i]rrelevant" as to the duty to defend under the umbrella policy."

not allege vicarious malicious prosecution against Christiansen. Finally, Truck contends the "bad faith" cause of action has no merit in that a) there can be no "bad faith" absent a breach of contract and b) assuming coverage under the Truck umbrella policy, plaintiff's "bad faith" claim is still precluded by the "genuine dispute doctrine." Given our resolution that the release justifies granting summary judgment, we need not reach the other contentions raised in support of the MSJ.

DISPOSITION

The summary judgment is affirmed. Appellant is to bear costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J.

FLIER, J.